Supreme Court, U.S.
FILED
AUG 21 2002
OFFICE OF THE CLERK

No. 01-1184

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANCISCO JIMENEZ RECIO AND
ADRIAN LOPEZ MEZA,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT ADRIAN LOPEZ MEZA

THOMAS A. SULLIVAN
Counsel of Record
702 E. Chicago St.
P.O. Box 606
Caldwell, ID 83606
(208) 454-2264

Attorney for Respondent,
Adrian Lopez Meza

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT	1
SUMMARY OF ARGUMENT	11
ARGUMENT	14
A. The Scope And Duration Of A Conspiracy Is A Question Of Fact	14
B. Depending On The Facts And The Indictment's A Conspiracy May End, Or Terminate, When It Fails Or Is Frustrated	17
C. *Cruz* Is Also A Proper Application Of The Law Of Multiple Conspiracies	25
D. Neither *Cruz* Nor This Case Creates Any New Hardship Or Difficulties For Law Enforcement Or Prosecution	34
CONCLUSION	38
APPENDIX A	App. 1

TABLE OF AUTHORITIES

Page

CASES:

Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 26

Brown v. United States, 150 U.S. 93, 14 S.Ct. 37, 37 L.Ed. 1010 (1893) 17

Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) 26, 27, 31, 34

Krulewitch v. United States, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949) 17, 34, 35, 37

Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892) 17

Paoli v. United States, 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957) 17

Terry v. United States, 7 F.2d 28 (9th Cir. 1925) 28

United States v. Aracri, 968 F.2d 1512 (2d Cir. 1992) 27

United States v. Armocia, 515 F.2d 29 (3rd Cir. 1975) 17

United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978) 18

United States v. Barnes, 681 F.2d 717 (11th Cir. 1982) 27

United States v. Belardo-Quinones, 71 F.3d 941 (1st Cir. 1995) 19, 20, 21, 22, 24

United States v. Bentson, 947 F.2d 1353 (9th Cir. 1991) 33

United States v. Bloch, 696 F.2d 1213 (9th Cir. 1982) 23

TABLE OF AUTHORITIES – Continued

Page

United States v. Bostic, 480 F.2d 965 (6th Cir. 1973) 25, 27

United States v. Broce, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) 26, 29, 30, 31, 33

United States v. Caro, 569 F.2d 411 (5th Cir. 1978) 19

United States v. Castro, 972 F.2d 1107 (9th Cir. 1992) 23

United States v. Chalarca, 95 F.3d 239 (2d Cir. 1996) 14

United States v. Couch, 28 F.3d 711 (7th Cir. 1994), cert. denied, 513 U.S. 993, 115 S.Ct. 495, 130 L.Ed.2d 405 (1994) 14

United States v. Cruz, 127 F.3d 791 (9th Cir. 1997) ..... *passim*

United States v. Dekle, 768 F.2d 1257 (11th Cir. 1985) 25, 27

United States v. Dennis, 917 F.2d 1031 (7th Cir. 1990) 25, 27

United States v. Gibbs, 739 F.2d 838 (3rd Cir. 1984) 23

United States v. Goldstein, 135 F.2d 359 (2d Cir. 1943) 18

United States v. Ingman, 541 F.2d 1329 (9th Cir. 1976) 34

United States v. Killian, 524 F.2d 1268 (5th Cir. 1975) 23

United States v. Knuckles, 581 F.2d 305 (2d Cir. 1978) 15

United States v. Lurz, 666 F.2d 69 (4th Cir. 1981) 32

TABLE OF AUTHORITIES – Continued

Page

United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975) 31, 36

United States v. Marable, 578 F.2d 151 (5th Cir. 1978) 32, 33

United States v. Martin, 4 F.3d 757 (9th Cir. 1993) 17

United States v. Martinez, 562 F.2d 633 (10th Cir. 1977) 31, 32

United States v. Meacham, 626 F.2d 503 (5th Cir. 1980) 19

United States v. Moss, 9 F.3d 53 (6th Cir. 1993) 23

United States v. Papia, 560 F.2d 827 (7th Cir. 1977) 18

United States v. Robertson, 659 F.2d 652 (5th Cir. 1981) 23, 24

United States v. Tavelman, 650 F.2d 1133 (9th Cir. 1981) 31

United States v. Umagat, 998 F.2d 770 (9th Cir. 1993) 10

United States v. Varella, 692 F.2d 1352 (11th Cir. 1982) 15

United States v. Williamson, 53 F.3d 1500 (10th Cir. 1995) 23

Wong Sun v. United States, 371 U.S. 471 (1963) 23

LAW REVIEW ARTICLE:

Developments In The Law Of Criminal Conspiracy, 72 HARV. L. REV. 920, 961 (1959) 18

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

16 Am.Jur.2d 210 14

O'Malley, Grenig, Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Ch. 38 25

P. Marcus, THE PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES, v. 1988 34

STATEMENT

1. On November 18, 1997, at 1:18 a.m. a Nevada state trooper stopped a white Nissan truck that was headed north out of Las Vegas, simply for traffic enforcement purposes. (Tr. p. 69).[1] Manuel Sotello was the driver and Ramiro Arce was the passenger. After becoming suspicious of the two, a search of the bed revealed 369 pounds of marijuana and 14.8 pounds of cocaine. (Tr. pp. 126-127). Sotello and Arce said they knew nothing of the drugs and that they were simply driving the truck to Nampa, Idaho, where they were instructed to leave it parked at Karcher Mall, a shopping center in Nampa, Idaho. (Tr. p. 169, 189).

The truck was flown to Idaho and placed in the Karcher Mall parking lot at about 10:00 a.m. on November 19, 1999, some 33 hours after the seizure of the truck and drugs. (Tr. p. 171). By 6:00 p.m. that evening, the agents concluded that Sotello and Arce had lied about their plan to simply leave the truck at Karcher Mall.[2] (Tr. pp. 191-192). The agents persuaded Arce to cooperate, and they hatched a plan whereby Arce would use a cellular phone to call a pager number that he had obtained in Arizona which he believed was a link to other participants. (Tr. pp. 197-198). Arce called the Arizona pager number, at about 7:29 p.m. on November 19, and minutes later, received a call in response. (Tr. p. 200). Arce explained to the unknown caller that Sotello had been arrested on traffic tickets and

---

[1] Throughout this brief, Tr. will be used to refer to the transcript of the second jury trial, January 12, 13, 14, and 15, 1999.

[2] Arce testified that the real plan was for Sotello to drop Arce off at his home in Caldwell, and then drive the white Nissan to its destination and deliver it to Delfino Corrales. (Tr. p. 484, 662, 663).

had instructed Arce to leave the truck at Karcher Mall and then to contact the pager number to pass on that information. (Tr. p. 199). I.N.S. Agent Nygaard listened in on the call, and testified that the caller was confused[3] about the location of the truck, was excited, and told Arce that "he was going to call a muchacho (boy) to come and get the truck." (Tr. p. 219).

Nothing more happened at the Karcher Mall stakeout for several hours. After several more calls by unknown persons back and forth, at about 10:30 p.m., a blue Mazda compact car driven by Appellant Lopez pulled up to the white Nissan and stopped; a man later identified as co-defendant Jiminez got out of the blue Mazda and started the truck. Both vehicles drove towards Marsing, Idaho. The truck went to Homedale, Idaho and was stopped by surveillance units on a back road between Homedale, Idaho, and Adrian, Oregon. The blue Mazda, driven by Appellant Lopez, initially stopped at the Sunnyslope Market near Marsing, Idaho, where a call was made. The Mazda then continued towards Homedale on a similar, but not identical, route to that of the truck, and was stopped by police within eyesight of the truck. (Tr. pp. 289-339).

Two "talk and toss" telephone cards were found in Lopez' wallet. (Tr. p. 363). The cards were the type one buys in a convenience store with a fixed amount of calling time. *Id.* To use the card, one simply dials an account number which is written on the card. *Id.* The card can be passed from one person to another, and one does not even

[3] The caller thought "Nampa" was "Tampa" and wasn't sure exactly who Arce was. Exhibit 54b, E.R. pp. 58, 62.

need to physically possess the card to use it, one simply needs the account number. (Tr. p. 372).

Records of these phone cards reflected that the account number assigned to the Lopez cards was used to call Nu Acres, was used to call other local pay telephones, and was used to call a cellular telephone listed to Roberto Valladares in Chicago. (Exhibit 69, See E.R. p. 57). The government produced no tangible evidence as to who participated in these phone conversations, or what the conversations were about. A number of the calls made on the phone card account, Exhibit 69, (E.R. p. 57) were not connected (the ones designated on that exhibit with an asterisk). Agent Hinton testified that over the four day period leading up to the 19th of November, eleven or twelve calls were actually connected using the Lopez calling card. (Tr. p. 688). Of the 400 phone calls placed or received on the cellular telephone found in Sotello's possession, none were connected to the calling card account numbers used, non-exclusively, by Lopez. (Tr. p. 684-685). None of the Sotello calls were to Nu Acres. *Id.*

The government's expert witness conceded that Appellant Lopez could not possibly have made all the phone calls traced to the card found on Lopez, because the time gap between two separate sets of calls was too short to allow for travel between the points of call origination. (Tr. p. 691).

Ramiro Arce took a plea bargain and testified against the other defendants. He related that he had known Sotello for years, and that immediately prior to the November trip to Arizona, Sotello recruited him to assist in bringing a load of drugs from Phoenix, Arizona, to Idaho in the white Nissan. (Tr. p. 466). Arce testified he did this for

forgiveness of a small debt owed to Sotello, and that this was the only drug smuggling incident he engaged in. *Id.* at 466, 495, 654. Prior to meeting Appellant Lopez in jail after the arrest on November 19, 1999, Arce had never seen Lopez and did not know Lopez. (Tr. p. 495).

Apart from the drugs present in the load truck, there was no evidence of any other drugs or any other load vehicles. There was no tangible evidence of any other past drug shipments.

There was no tangible evidence of planned future shipments. (Tr. p. 656). Agent Hinton indicated his belief that Arce was truthful in his account that he had been recruited at the last minute to participate in just the one trip to get drugs. (Tr. p. 654).

2. An amended superseding indictment was filed on January 16, 1998. Count one charged that "From on or about a date uncertain, but by November 18, 1997, within the District of Idaho, Manuel Sotelo, Ramiro Arce, Francisco Jiminez and Adrian Lopez, defendants herein, did knowingly, intentionally, and unlawfully conspire, confederate and agree with others, both known and unknown to the Grand Jury, to commit an offense against the United States, that is, to possess with intent to distribute and/or distribute cocaine . . . and or marijuana. . . . " The second count charged that the same four defendants possessed with intent to distribute, marijuana and cocaine.

The limiting language of the indictment, charging that Appellant joined "by" November 18, 1997, was born out by Government's opening and closing arguments at the first trial:

> There are two counts in the indictment . . . The first is conspiracy. The evidence will show you that there was indeed a conspiracy, that is, an association and a agreement among these three individuals and Mr. Arce and others to bring narcotics from the southern part of the United States up to Idaho.

(Government's Excerpt of Record (hereinafter G.E.R.), Vol. I, p. 46-47 of first trial, March 17, 1998, opening statements).

The case proceeded to jury trial on March 16, 1998, against Defendants Sotello, Jiminez, and Lopez. The jury returned guilty verdicts on both counts against each defendant. Appellant Lopez moved for Judgment of Acquittal under F.R.Cr.P. 29, (E.R. p. 3) and under the holding in a similarly postured case, *United States v. Cruz*, 127 F.3d 791 (9th Cir. 1997).

The Government filed a "Response By United States To Defendants' Motions For Judgment Of Acquittal" on April 8, 1998. The Government argued therein:

> The *Cruz* case is distinguishable from the case at bar. . . . As to Defendants Jiminez and Lopez, the arrest of Sotelo and Arce and the seizure of the narcotics in Nevada did not terminate the conspiracy or defeat the object of that conspiracy as far as they were concerned, by virtue of their prior involvement. Indeed, their activities after the arrest and confiscation were merely a manifestation of that prior involvement. In this regard, the telephone call by Arce was not that of "recruitment," but one of notice of the load arrival in a pre-existing and ongoing conspiracy as far as they knew and were concerned. . . . All of the evidence admitted as to [] Jiminez and Lopez

> . . . manifested prior involvement. . . . When Arce made the delivery notice telephone call, he did so as a co-conspirator to other co-conspirators, with yet other co-conspirators responding to pick up the load.

(See Appendix A to this Brief, p. 4-5).

In a Memorandum Decision And Order filed July 27, 1998, the District Court denied the motion for judgment of acquittal, but found sufficient error in the proceedings to *sua sponte* convert the motion to a motion for new trial, and the District Court set aside the conviction and re-set the case for jury trial. *See* M.D.O (E.R. pp. 5-14).

The government thereafter filed another motion asking the trial court to reconsider that order. Res. App. 17a. Therein the government stated it "agree[d] with the essential formulation of the primary issue" of whether "a rational trier of fact [could] find that Lopez and Jiminez were members of the conspiracy prior to the seizure of the drugs in Nevada at 1:18 a.m. on November 18." Res. App. 18a. Therein the government characterized the *Cruz* case as a conspiracy that was limited by the indictment and the evidence to five individuals and one load of drugs, one in which Cruz was indisputably not involved prior to the seizure. The government stated that in this case, "the charging document refers to a conspiracy that had been ongoing from a date uncertain up to and including November 18, 1997." Res. App. 19a. The government asserted that "the evidence was substantial that Defendants Jiminez and Lopez were involved in the conspiracy prior to the November 18 seizure in Nevada" and thus "there is no need to consider whether or not Jiminez and Lopez were members of a new conspiracy subsequent to the seizure of

the drugs [because] they were clearly members prior to that seizure." Res. App. 21a.

The case proceeded to a second trial on January 12, 1999, but only on the conspiracy charge, Count One of the superseding indictment, and only defendants Jiminez and Lopez were re-tried. The government moved to sever, and eventually to dismiss, Count Two, the substantive charge of possession with intent to distribute as to Lopez.

The District Court gave a jury instruction, no. 24, on the scope and duration of the conspiracy. (E.R. pp. 52-54). The instruction stated, in part:

> Therefore, if you find beyond a reasonable doubt that a conspiracy existed, the sole object of which was the possession with intent to deliver and/or the delivery of the controlled substances seized by authorities in Las Vegas, Nevada on November 18, 1997, a defendant may be found guilty of that conspiracy only if you find beyond a reasonable doubt that the defendant joined or became a member of the conspiracy prior to 1:18 a.m. on November 18, 1997.

The trial court also, at the government's request, provided a larger conspiracy theory instruction as an alterative, stating:

> On the other hand, if you find beyond a reasonable doubt that a conspiracy existed, the object of which was the possession with intent to deliver and/or the delivery of controlled substances beyond those seized by authorities in Las Vegas . . . a defendant may be found guilty of that larger conspiracy only if you find beyond a reasonable doubt that the defendant joined the conspiracy, whether before or after November 18,

> 1997, and that he knew or had reason to know of the scope of the larger conspiracy and embraced its objective.

(Tr. p. 758). The government was satisfied with this instruction. Res. App. 29a.

The jury returned guilty verdicts on the sole conspiracy count against Appellant Lopez and against Jiminez. Again, Appellant Lopez filed a motion for judgment of acquittal. (E.R. pp. 64-65). The District Court denied the motion by way of Memorandum Decision And Order of April 19, 1999. (E.R. pp. 72-74). Appellant Lopez was sentenced to 132 months imprisonment.

3. On direct appeal, the Ninth Circuit Court of Appeals held that the evidence presented by the United States was insufficient to convict Lopez of either of the two theories of conspiracy set forth in Instruction No. 24. On appeal, the government argued that a reasonable inference from known facts demonstrated that Lopez was involved "well before the seizure" of the drugs, because his "post-seizure behavior not only corroborated his pre-seizure activity . . . but, in and of itself, suggested prior involvement" and "[m]oreover, those same facts show a pre-existing conspiracy that involved much more than the single load as evidenced by the quantity of narcotics involved, the organization, communication patterns and structured activities." Res. App. F. The Court of Appeals was not convinced with the government's proof:

> The district court held, and the government argues, that there was some evidence tying Lopez-Meza and Jimenez Recio to the conspiracy before the drugs were initially seized. The district court stated that "Lopez's and [Recio's] words and conduct, upon their picking up the truck in Nampa and subsequently being stopped by the authorities, provided a probative link between themselves and the specific conspiracy charge." Further, before the initial seizure, both Jiminez Recio and Lopez-Meza allegedly called the same telephone number in Idaho and different numbers in Chicago using pre-paid calling cards.
>
> This is insufficient evidence of guilt. Nothing Defendants said or did on November 18, 1998 directly links them to the pre-seizure conspiracy. That Jiminez Recio and Lopez-Meza lied to officers upon arrest points only to knowledge that they were involved in illicit activity at that time and provides no basis for concluding that they were involved in the conspiracy beforehand. There is also no proof that Jimenez Recio and Lopez-Meza used the pre-paid calling cards; anyone could have used them by dialing the pin number code. In fact, it is clear that at least two of the calls upon Lopez-Meza's card *were* made by someone else. The government produced no evidence identifying the participants in or the contents of the conversations. . . .
>
> * * *
>
> On the other hand, there is strong evidence that Lopez-Meza and Jimenez Recio were not involved in the pre-seizure conspiracy. The government's main witness, Arce, had never met either Lopez-Meza or Jimenez Recio before the drugs were seized. Once the police decided to continue the drug operation, Arce called an Arizona pager number to arrange for a drop-off, but neither Lopez-Meza nor Jimenez Recio were among the three callers who responded to the page. One of the callers returning the page

stated that he would send a "muchacho" ("boy" in Spanish) to get the truck, suggesting that Defendants were simply drivers hired at the last minute. Furthermore, the initial conspiracy did not envision a drop-off in the Karcher Mall parking lot where Lopez-Meza and Jiminez Recio retrieved the truck – the police initiated the arrangement to meet there as part of their post-seizure "sting" operation. Indeed, Arce and the government's own expert testified that Arce and Sotello, the original driver, would have driven the drug truck to the Nu Acres "stash house" themselves had they not been stopped and arrested. Taken as a whole, the evidence was insufficient for a rational jury to conclude beyond a reasonable doubt that Defendants were involved in the conspiracy to deliver the drugs prior to the initial seizure of the truck.

The government also relied on an additional broader conspiracy theory to circumvent *Cruz* on retrial, providing detailed expert testimony demonstrating that the drug shipment bore the hallmarks of a complex and sophisticated operation that likely involved more than one shipment. However, the limited role Defendants played in the November 18 shipment alone is insufficient to charge them with complicity for any prior loads. *Cf. United States v. Umagat*, 998 F.2d 770, 773-774 (9th Cir. 1993)(minor role of defendants in single transaction does not permit imputed liability for the broader conspiracy). Therefore, this theory too hinges on proof of prior involvement. . . .

Ultimately, however, we remain unpersuaded. . . .

> As for Lopez-Meza's multiple links to his uncle Jose Meza (a.k.a. "Raul") and to Nu Acres, the "stash house" where both Lopez-Meza and Jose Meza apparently lived at times, these are hardly probative of nefarious activity. Much of the dissent's reasoning from these facts amounts to guilt-by-association. If Lopez-Meza indeed lived at Nu Acres, so did many other immigrants. His presence on the scene and familial ties to Jose Meza just as readily support the theory that he was simply a convenient substitute recruited at the last minute.

The government filed a petition for writ of certiorari, which was opposed by respondent. The petition was granted and the matter is before this Court.

SUMMARY OF ARGUMENT

The issue presented in the Petition is "whether a conspiracy ends as a matter of law when the government frustrates its objective." Petitioner argues that the Ninth Circuit Court of Appeals held in *United States v. Cruz*, supra, and again in this case that "a conspiracy automatically ends when law enforcement intervenes and frustrates the conspiracy's objective." (Pet. Brf. p. 11).

Respondent does not agree with the sweeping interpretation of *Cruz* suggested by Petitioner. If *Cruz* stood as precedent for the proposition that the government's arrest of a co-conspirator and seizure of the drugs bars prosecution as a matter of law for any additional conspiratorial acts subsequent to that intervention, then *Cruz* would stand alone without clear support from prior precedent. While no case has gone so far as to hold that a conspiracy

automatically terminates, or ends, as a matter of law upon intervention and frustration by the government, many have held that a conspiracy, once in existence, continues until it comes to an end, whether by success or failure, or when the ends have been so frustrated or its means so impaired that this continuation was no longer plausible.

The scope and duration of a conspiracy are questions of fact and most cases treat the issue as such, refusing to conclude that conspiracy liability terminates **as a matter of law** because of the arrest of co-conspirators or seizure of drugs. In contrast, courts have recognized that within the context of a given set of facts and a given conspiracy charge, intervening occurrences may have the consequential effect of ending, or terminating, the charged conspiracy, not necessarily as a matter of law, but as a matter of practical fact.

This case, and *Cruz*, follow that precedent because nothing in the holdings suggest that the occurrence of a fact, intervention by the police and seizure of the drugs, terminated further conspiracy liability as a matter of law. Both cases simply recognized that, on the facts presented, there was insufficient evidence that Billy Cruz or Adrian Lopez joined the specific conspiracy charged in the indictment before it ended. Both cases rely simply on the fact that the government charged each with joining a conspiracy, to possess with intent to deliver drugs, that led up to the seizure of the drugs, yet the evidence revealed that each defendant was recruited after, and as a result of, the government intervention, which was a separate agreement, a separate conspiracy.

Thus, *Cruz* and this case are also correct applications of the long-settled law concerning multiple conspiracies,

applied in most, if not all, Federal Circuits, and given as a jury instruction, that "if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy." *Cruz* specifically stated that the facts of the case demonstrated that Billy Cruz was not a member of the charged conspiracy; the opinion stated that Cruz may well have been a member of some other conspiracy not charged in the indictment. *Cruz* did not purport to hold that such a charge for post-seizure conspiracy activity could not be made, but only held that it was not in fact charged in the indictment.

This case follows suit. The indictment specifically alleged that Recio, Lopez, Arce, and Sotello joined the conspiracy on a date uncertain but "by November 18, 1997." A charge of conspiracy is limited by the terms of the indictment. In addition to the language of the indictment, the government specifically indicated to the trial court and to the jury that it charged a conspiracy based upon Lopez' involvement in the conspiracy before, and leading up to, the seizure, and refuted the notion that the charge was based upon a simple theory that Lopez was a new recruit after the seizure. The Ninth Circuit Court of Appeals found that the government's alleged proof of its claim was entirely lacking, that Lopez was likely recruited afterwards as a result of the government's intervention, a key factual similarity to *Cruz*. Thus, these facts were not used by the Ninth Circuit to construct a bar to conspiracy prosecution, but they do evidence a separate conspiracy not charged in the indictment which cannot sustain a guilty verdict upon the charged conspiracy.

Finally, contrary to Petitioner's concerns, nothing in *Cruz* or in this case serves to create any new or additional barrier to investigation or prosecution of criminal conspiracies. This Court long ago commented that because of the factual complexity and number of suspects, conspiracy prosecutions are usually difficult. The bottom line is that suspects such as Lopez can of course still be arrested and charged for any substantive crimes committed or attempted, and can be charged with any conspiracy that he/she actually joined. This Court should decline Petitioner's invitation to erode the few basic protections afforded by our laws against what has been described as an elastic, sprawling, and pervasive offense that can be a threat to fairness in our administration of justice, and which should not lightly be extended to meet the exigencies of a particular case.

ARGUMENT

A. The Scope And Duration Of A Conspiracy Is A Question Of Fact.

The law itself does not establish a fixed time at which a conspiracy must have been entered into and the law does not require any particular duration. *United States v. Couch*, 28 F.3d 711 (7th Cir. 1994), cert. denied, 513 U.S. 993, 115 S.Ct. 495, 130 L.Ed.2d 405 (1994). "The duration of a conspiracy will depend on the terms of the conspiracy agreement but, generally, a conspiracy exists from the time of forming the criminal agreement until it terminates by abandonment, frustration, or the achievement of the conspiracy's objective." *See* 16 Am. Jur. 2d 210, *U.S. v. Chalarca*, 95 F.3d 239 (2d Cir. 1996). The duration and termination of a conspiracy is determined by the particular

facts of each case. *United States v. Varella*, 692 F.2d 1352, 1362 (11th Cir. 1982); *United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir. 1978).

Because of this, Petitioner's statement of the issue presented, whether a conspiracy ends as a matter of law when the government frustrates its objectives, is not conducive to a short and certain legal answer. The answer, of course, depends upon the precise nature of the given criminal agreement, the specifications of the indictment, and what frustration subsequently occurs. Petitioner's assertion that *Cruz* held that a conspiracy "automatically" ends when law enforcement intervenes and frustrates the conspiracy's object overstates the precise holding of the case. The indictment in *Cruz* "charged a five-member conspiracy of Balajadia, Taitano, Tenorio, Mesa and Cruz." 127 F.3d 791, 795 n. 4. The conspiracy was limited to an agreement by Balajadia to carry a 210 gram package of drugs from California to Tenoria in Guam, at the behest of Mesa, and with the assistance of Taitano. In transit, Taitano and Balajadia were arrested and the drugs were seized. At that moment in time, by stipulation of the parties, Cruz was undisputedly *not* involved in the conspiracy.

The court determined that on these facts, the conspiracy that was **charged** terminated at this time. The criminal agreement was that Balajadia would smuggle one packet of drugs from Mesa in California to Tenorio in Guam. When that failed (either because of government intervention in fact or because Mesa and Tenoria believed the government's lie that Balajadia had simply failed in his mission for financial reasons) a *new agreement* was reached that Cruz would go to and smuggle a packet from Hawaii to Guam. Those are two agreements, separate in

time, separate in membership, with the distinguishing factor that the second agreement occurred only because of, and as a result of, the original conspirator's belief that the first agreement had failed. The second, new "mule" was recruited because the first "mule" failed. Given that, the gravamen of conspiracy is the agreement itself, a new agreement reached because a prior one failed can be a new conspiracy.

The court held that because the charged conspiracy, the agreement itself, was a five-member one and the government stipulated that Cruz was not involved until Balajadia and Taitano had been arrested and the drugs seized, Cruz could not possibly have joined the charged conspiracy. *Id.* at 795, n. 4. "Cruz may have been a member of a *new* conspiracy between himself, Mesa, and Tenoria [however] that conspiracy was not charged in the indictment." *Id.* No less than three times, on page 795 of the decision, does the *Cruz* court reiterate that the arrest and seizure did not terminate conspiracy liability in general, but rather emphasized the fact that Cruz simply did not, and could not possibly have, joined the charged conspiracy before it ended. *Id.* The court twice pointed out that Cruz was not charged with the conspiracy proven by evidence, the one that began after and as a result of the Balajadia's withdrawal from the conspiracy and his failure to deliver. "We therefore find that the evidence was insufficient for any rational jury to have found beyond a reasonable doubt that the [charged] conspiracy was still in existence at the time Cruz became involved." *Id.* at 796.

Cruz, therefore, was specifically limited to the relatively simple facts involved, and the specific conspiratorial crime, or agreement, charged in the indictment. *Cruz* is by no means alone in its specific review of whether the facts

demonstrates that the conspiracy which was charged has been proven. *See United States v. Martin*, 4 F.3d 757 (9th Cir. 1993) (wherein the court noted that the indictment alleged five people agreed with each other in one conspiracy, and the facts showed that Martin, although involved in drug dealing, was double-crossed by three of the others and the proof failed to establish the overall conspiracy charged), and other cases below.

B. Depending On The Facts And The Indictment's Charge, A Conspiracy May End, Or Terminate, When It Fails Or Is Frustrated

1. This Court recognized long ago that statements made by a co-conspirator not made pursuant to and in furtherance of the object of the conspiracy charged in the indictment, but rather made after the objective had failed or been achieved, were not admissible. *See* Annotation, 1 L.Ed.2d p. 1787. "After the conspiracy has come to an end whether by success or failure" the confessions of one conspirator are not admissible against another. *Brown v. United States*, 150 U.S. 93, 97, 14 S.Ct. 37, 37 L.Ed. 1010, 1013 (1893); see also *Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892). There can be no furtherance of a conspiracy that has ended. *Paoli v. United States*, 352 U.S. 232, 237, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957). Statements made after a conspiracy ends in success or failure are not admissible. *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790 (1949).

The determination is based primarily on specific facts involved and what the conspiratorial agreement is. *United States v. Armocia*, 515 F.2d 29 (3rd Cir. 1975). For instance,

> It cannot be said that the conspiracy which was amply proved without this evidence was ended merely because this particular [bootleg alcohol] still had been seized and some of the conspirators arrested. The conspiracy was "to defraud the United States by evading and defeating, and attempting to evade and defeat, the payment of Internal Revenue taxes duly imposed by law on distilled spirits." Undoubtedly that part of the conspiracy which involved the manufacture of alcohol with the still that was seized at 102 Murray St. had been frustrated and the arrests may well have checked the activities of the conspirators taken into custody; but to say the unlawful agreement had been terminated when Levigno paid the bill and admonished the merchant to say nothing in court would mean that the conspirators no longer planned to defraud the government by evading the payment of distilled spirits taxes due.

United States v. Goldstein, 135 F.2d 359, 361 (2d Cir. 1943). Commentators have suggested that this case may have been abuse of the concept of a "continuing" conspiracy, noting that it seemed "clear the conspiracy ended with the frustration of its purpose." Developments In The Law Of Criminal Conspiracy, 72 HARV. L. REV. 920, 961 (1959).

Cases have also held that a co-conspirator's arrest does not in itself terminate a conspiracy as a matter of law. *United States v. Papia*, 560 F.2d 827, 835 (7th Cir. 1977). It is a factual inquiry, and many courts have gone either way. In *United States v. Barnes*, 586 F.2d 1052 (5th Cir. 1978), police arrested Barnes' alleged co-conspirators at an airport and seized the cocaine, although Barnes had not been arrested yet. 586 F.2d at 1054. In deciding

whether a post-seizure statement was admissible, the court held that at the time of the statement, the cocaine had been confiscated and two other co-conspirators had been arrested, and the conspiracy was ended. *Id.* at 1059.

Similarly, in *United States v. Caro*, 569 F.2d 411 (5th Cir. 1978), two co-conspirators in a heroin conspiracy were arrested upon their attempt to sell heroin to an undercover agent, and the heroin was seized. 569 F.2d at 415. Caro had not been arrested and one of the co-conspirators made post arrest/seizure statements which were held inadmissible because it occurred after the termination of the conspiracy. *Id.* at 416, n. 9.

In *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), various defendant co-conspirators unwittingly conspired with, and hired, two undercover agents to be pilots to fly-in marijuana from Columbia to the United States. After the airplane crashed on October 8, 1978, the DEA "staged" the return of the undercover pilots to an airstrip in Newborn, Georgia, at which time two defendants were apprehended, and others were arrested in the following weeks. 626 F.2d at 506. The court held that various statements made after October 10 could not be admitted because the events of October 10 "wiped out" and ended the conspiracy. *Id.* at 510-511 n. 8.

2. The Petitioner in this case relies on the case of *United States v. Belardo-Quinones*, 71 F.3d 941 (1st Cir. 1995), for its assertion that *Cruz* is a wrongly-decided aberration which created a conflict among the circuits. A close look at the charges and facts reveals that *Belardo-Quinones* does not conflict with *Cruz*, and it actually supports the decision of the *Cruz* court. The indictment specifically charged "a conspiracy that began on October

26, 1991 with the objective of transporting marijuana from Columbia and ended on November 6, 1991 when the conspirators found out that the boat for which they had been searching had been seized by Venezuelan Authorities." 71 F.3d 941. Belardo-Quinones was specifically described as having joined the conspiracy on November 2, 1991 when he agreed to supply a boat and crew to meet with the Columbian smugglers at sea. *Id.* The indictment ended with an allegation that on November 6, 1991, one of the conspirators made calls announcing that the boat had been seized. *Id.*

Belardo-Quinones appealed the trial court's denial of his bill of particulars which demanded the exact date the boat was seized by Venezuelan authorities, the purpose of which was to "present a defense that, for him, the crime of conspiracy to import marijuana had become impossible to achieve because the boat was seized prior to November 2, 1991." *Id.* The government asserted that the boat was seized "after the rendezvous failed", after Belardo-Quinones joined. The Court of Appeals held the denial of the bill of particulars not error because "[t]his indictment contained more than enough information to allow defendant to prepare his defense." *Id.* "The temporal details in this indictment were sufficient to allow the defendant to present a defense that the conspiracy had ended before he came into the picture." *Id.* at 943-944.

The *Belardo-Quinones* court therefore approved of the very defense which was established and was the basis of the *Cruz* decision: whether the conspiracy ended before the defendant became a member. The two decisions are in harmony and consistent. They both correctly focused on what was charged in the indictment and what the facts

showed, and not on general "conspiracy" principles not at issue.

The *Belardo-Quinones* court also went on to discuss why the defendants' stated theory of defense, that the crime was impossible **to achieve** because the smuggling boat was seized before he met with co-conspirators. Because the court had already ruled on other grounds, this discussion is dictum. Still, the further discussion relates to a defense distinctly different than the one in *Cruz*, which was Belardo-Quinone's suggested defense that because the boat was seized prior to the point in time he met with and conspired with other members, it would be impossible to achieve the importation of marijuana. Respondent does not dispute the court's suggestion that such a defense would not have merit. It is no different than the case of a person, arrested for agreeing and conspiring to drive across town and murder someone, suggesting that despite the clear existence of the conspiratorial agreement, the murder was impossible to commit because his car was in disrepair and inoperable. The proper question is whether the defendant joined the charged conspiracy by agreeing and becoming a party thereto before it ended, not whether his timely joinder was mooted because the goal could no longer be achieved.

Belardo-Quinones involved a clearly charged indictment alleging that the defendant conspired within a certain time frame and his actions in that regard were proven. The case does not directly address the question presented in *Cruz*, which, on the facts of *Belardo-Quinones* would be whether someone who "came into the picture" after November 6, 1991 could be found guilty of the conspiracy charged. However, the case strongly suggests that would be a proper defense. 71 F.3d at 944.

A final feature of importance, when comparing the cases, is how *Belardo-Quinones*' suggestion that it would be "a defense that the conspiracy had ended before he came into the picture" applies even more strongly to the facts of *Cruz*. In contrast to *Cruz*, the government in *Belardo-Quinones* did not encourage that defendant, through the use of an arrested conspirator controlled by the government, to come join a conspiratorial plot that had already been foiled. Without any government encouragement, Belardo-Quinones voluntarily agreed to supply a boat and crew to meet a Columbian boat to smuggle marijuana, and in fact, received an upward adjustment on his sentence for his managerial role in recruiting, supplying, and instructing other co-defendants on how to handle the rendezvous-at-sea marijuana pick up.[4] 71 F.3d at 946.

Of course, *Belardo-Quinones* may be read to simply beg the question, when does the conspiracy end? That case relied on the allegations of the indictment and the facts involved. The question was not whether any particular intervention terminated a conspiracy, in general, as a matter of law, and correctly so. Many other cases, some set forth below, employ the same analysis by examining the facts against the *charged* conspiracy.

Cruz relied on existing law, that a conspiracy is deemed to continue until there is affirmative evidence of

[4] These facts reveal the suggested defense, that "the crime of conspiracy to import marijuana had become impossible to achieve because the boat" was seized, is ludicrous. If the defendant recruited and trained helpers to make an at-sea marijuana smuggling rendezvous, within the parameters of the indictment, whether success is achieved is immaterial to a charge of conspiracy *for him*.

defeat of the object of the conspiracy, citing *United States v. Castro*, 972 F.2d 1107 (9th Cir. 1992). *Castro*, in turn, relied on *United States v. Bloch*, 696 F.2d 1213 (9th Cir. 1982) for that very point of law, and *Bloch* relied on earlier cases. Other circuits are in agreement: a conspiracy has ended when its objectives have been achieved or have been rendered impossible, *United States v. Moss*, 9 F.3d 53 (6th Cir. 1993) (*citing to Wong Sun v. United States*, 371 U.S. 471, 490 (1963); a conspiracy continues to exist until it is abandoned, succeeds, or is otherwise terminated by some affirmative act, *United States v. Williamson*, 53 F.3d 1500 (10th Cir. 1995); a conspiracy terminates when the ends of the conspiracy have been so frustrated or its means so impaired that continuation is no longer plausible, *United States v. Gibbs*, 739 F.2d 838, 845, n. 18 (3rd Cir. 1984).

Another factually similar case from the Fifth Circuit reaches the same conclusion as in *Cruz*. In *United States v. Killian*, 524 F.2d 1268 (5th Cir. 1975) three conspirators were arrested in the home of one and the drugs were seized. 524 F.2d at 1270. Shortly thereafter, another alleged co-conspirator (Rowell) telephoned the home and spoke to the agents, leading the investigation forward. *Id.* The court commented that "[b]y the time of [that] call, the only conspiracy alleged in the indictment was totally terminated, having been finally frustrated by the arrest of the three persons present at the Turner residence and the seizure of the remaining PCP on hand." *Id.* at 1272. Similarly, in *United States v. Robertson*, 659 F.2d 652 (5th Cir. 1981), the court suggested that because a truck, with its cargo of drugs, had been seized and conspirators arrested "[i]t might be argued that control of the pickup and, therefore, control of the substantive element of the conspiracy, the marijuana, would have made it impossible

for a party to become a new member of the conspiracy, since the conspiracy had terminated." 659 F.2d at 657, n. 2. The court did not answer the question as it was clear that Robertson had actively participated in a "scout car" on the very same marijuana run, and that she was present throughout the acquisition of the marijuana itself. *Id.* at 656.

4. The case at bar is consistent with both *Cruz* and *Belardo-Quinones*. The indictment in this case limited the duration and scope of the charged conspiracy, in that it alleged Lopez became a member "by November 18." The government's stated position in the trial court certainly clarified that limitation, that it would prove a case within the temporal parameters of the indictment, that it would prove Lopez joined the conspiracy prior to the seizure on November 18. The government refuted the notion that the charge was based on Lopez's recruitment into the conspiracy as a result of Arce's cooperative efforts some 42 hours after the seizure: ("there is no need to consider whether or not Jiminez and Lopez were members of a new conspiracy subsequent to the seizure of the drugs [because] [u]nlike Cruz, they were clearly members prior to that seizure"; Res. App. 21a); ("In this regard, the telephone call by Arce was not that of "recruitment," but one of notice of the load arrival in a pre-existing and ongoing conspiracy as far as [Lopez and Recio] knew and were concerned." App. p. 4); (The indictment "refers to a criminal conspiracy that had been ongoing from a date uncertain up to and including November 18, 1997"; Res. App. 19a).

In light of the way the government framed, and viewed, the indictment and the issue at trial, the Court of Appeals determined simply that there was insufficient

evidence to support their chosen conspiracy charge. The decision was correct and should be affirmed.

C. *Cruz* Is Also A Proper Application Of The Law Of Multiple Conspiracies

The federal circuits have all adopted a version of an oft-given jury instruction in conspiracy cases which states "if you find that any defendant was not a member of the charged conspiracy, then you must find that defendant not guilty, even though that defendant may have been a member of some other conspiracy." O'Malley, Grenig, Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS, Ch. 38; *United States v. Bostic*, 480 F.2d 965, 968 (6th Cir. 1973); *United States v. Dennis*, 917 F.2d 1031, 1033 (7th Cir. 1990) (reversing a conviction where indictment alleged a single conspiracy connecting three members and the evidence showed two, two-member conspiracies of the same nature; failure to give a multiple conspiracy instruction was reversible error). That instruction was given in this case. (Tr. p. 1009). Other cases have held, consistent with the outcome in *Cruz*, that the existence of multiple conspiracies requires reversal only where the defendant's involvement in a particular conspiracy is not the conspiracy charged in the indictment. *See, e.g., United States v. Dekle*, 768 F.2d 1257, 1261 (11th Cir. 1985) and cases cited therein.

There are far too many reported decisions which address the complicated issue, of whether a single versus a multiple conspiracy has been shown, to cover in this brief writing. Generally, they fall within two categories which will be briefly discussed. The first are cases where a defendant argues that an indictment alleged one overall

conspiracy and the proof as to him showed only his involvement in a conspiracy more limited in scope and membership than that alleged in the indictment. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). The second category are the cases which analyze whether a given conspiracy conviction can survive a double jeopardy challenge. *United States v. Broce*, 488 U.S. 563, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989). Both of these arenas provide ample support for the Court of Appeals' decisions in *Cruz* and this case.

1. This Court in *Kotteakos* reversed a conspiracy conviction wherein thirty-two defendants were joined in a one-count conspiracy indictment. On appeal from the conviction, the government conceded that the proof did not show one overall conspiracy as alleged, but rather it showed several. 328 U.S. at 755. However, it was also clear that the proof was more than sufficient to uphold each defendants' conviction for his involvement in a limited conspiracy even though there was not one overall conspiracy as alleged. Based on that, the government urged that the error was harmless. This Court disagreed, and on the facts, rejected blind adherence to prior holdings suggesting that "the fact that the proof disclosed two conspiracies instead of one, each within the terms of the indictment, cannot prejudice [the] defense." 328 U.S. at 758, *quoting Berger v. United States*, 295 U.S. 78, 79 L.Ed. 1314, 55 S.Ct. 629 (1935). This Court concluded that the prejudice arising from the mass trial was too great to ignore, and in doing so, called "for use of every safeguard to individualize each defendant in his relation to the mass" despite the fact that it is inconvenient for the prosecution because our government has a stake in citizens "being afforded our

historical individual protections, including those surrounding criminal trials." 328 U.S. at 773.

What is most notable about *Kotteakos* in relation to this case is that here, the government, in seeking to overturn this case and *Cruz*, is asking the Court to favor a conviction which is not only of a conspiracy different from the single one charged in the indictments, but is a separate conspiracy that is *not* "within the words of the indictment." This effort by the government is more dangerous to the safeguards and protections which were upheld in *Kotteakos* than was the government's position in *Kotteakos* itself. About those protections, "we dare not become careless or complacent when that fashion has become rampant over the earth." *Kotteakos v. United States*, 328 U.S. at 773.

From that landmark decision, has sprung the protections of the multiple conspiracy instruction referred to above. And from that instruction, has sprung many appellate cases which consider whether the government proved the single conspiracy charged, or a separate conspiracy. The appellate review focuses on the precise conspiracy charged and the facts involved, and therefore has always been handled on a case-by-case basis. *See Dennis*, *Bostic*, and *Dekle*, supra. *See also United States v. Barnes*, 681 F.2d 717, 726-727 (11th Cir. 1982) (stating that the multiple conspiracy question is a factual one and was appropriately included as a jury instruction); *United States v. Aracri*, 968 F.2d 1512, 1521 (2d Cir. 1992) (the court conducted a review of the evidence to determine if the jury could have properly concluded the evidence showed one, and not multiple, conspiracies).

Much earlier, in *Terry v. United States*, 7 F.2d 28 (9th Cir. 1925) defendants were indicted for conspiracy to illegally transport liquors in violation of the National Prohibition Act. 7 F.2d at 29. The indictment specifically charged that Terry participated in a conspiracy in November, 1921 at or near Allen's Wharf to do so. *Id.* The evidence against *Terry* primarily related to his activities to transport liquor six weeks earlier at Bodega Bay. *Id.* His conviction was reversed upon a sound holding that still rings true:

> The plaintiff in error contends that the charge in the indictment is limited to a conspiracy entered into at or near Allen's Wharf, in the county of Monterey, and does not extend to or include the prior incident at Bodega Bay. . . . The charge is limited, however, by the terms of the indictment itself. The indictment here charges but one combination or conspiracy, however diverse its objects, and no defendant could be convicted thereunder unless he was shown to be a member of or party to that conspiracy. Furthermore, the scope of the conspiracy must be gathered from the testimony, and not from the averments of the indictment. The latter may limit the scope but cannot extend it.
>
> Here we find no testimony tending to show any general conspiracy covering and including both the incident at Allen's Wharf and the incident at Bodega Bay. . . .
>
> * * *
>
> In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict for the sins of a lifetime.

7 F.2d at 29-30.

The decisions in this case and in *United States v. Cruz* are therefore entirely consistent with the above authorities in that the review of the evidence showed at most multiple conspiracies in that Cr[illegible]d Lopez were at most involved in a separate, new consp[illegible]y, and not the one charged in the indictment. The government's key informant here, Arce, indicated that it was a one-time agreement on his part to smuggle the one load of drugs which was seized in Nevada. Lopez only became involved after, and as a result of, that failure, about 45 hours later.

2. The second category of "multiple conspiracy" cases are the ones brought in a double jeopardy context. *United States v. Broce*, supra, was such a case. Broce plead guilty to two separate conspiracy indictments charging a bid-rigging scheme. 488 U.S. 566. Meanwhile, another similarly situated defendant took a similar charge to trial and was acquitted. *Id.* The government re-indicted that defendant, Beachner, on three other bid rigging conspiracy charges. *Id.* Beachner successfully moved to have the second case dismissed on double jeopardy grounds by showing that all the bid-rigging was part of one, overarching conspiracy *Id.* at 567. Upon learning this, Broce attempted a collateral attack on his second conviction, asserting the same double jeopardy claim. This Court concluded, that notwithstanding the correctness of the Beachner case, that the Broce indictments themselves alleged two distinct conspiracies, specifically noting "that is how all the participants viewed the indictments at the

time." 488 U.S. at 571, n. 5b. The Court noted that generally, a single agreement to commit several crimes constitutes one conspiracy, while multiple agreements to commit separate crimes constitute multiple conspiracies. *Id.* at 570-571. The Court concluded that by pleading guilty to two indictments, Broce forfeited his opportunity to challenge "the theory of the indictments" which on their face charged two separate conspiracies, noting "our reading of the indictments is the necessary one, and was shared by all participants to the plea proceedings." *Id.* *Broce* reveals that even though the ultimate facts may show one conspiracy, the government may charge separate ones and distinct ones. In this case and in *Cruz*, the government charged a distinct conspiracy that led up to the seizure of the drugs. The government felt confident the proof would bear this out. Perhaps the government felt a jury would not be receptive to a conspiracy prosecution against someone who was, or may have been, recruited into the case by a cooperating suspect at the government's behest, and therefore, sought to avoid this issue by alleging he was a member all along.

In this case, Respondent challenged the "theory of the indictment", which was that Lopez joined a conspiracy that led up to the seizure of the drugs, in the manner suggested by *Broce*. 488 U.S. at 571. Just like the fact that Broce was held to have forfeited his right to challenge the theory that there were two distinct conspiracies because in pleading guilty he "shared" that view of the indictment, so too should the government here be held to its view and theory of the indictment in trial court. The government's view and theory of the indictment quite clearly was that it charged Lopez as a member of a conspiracy that led up to

the seizure of the drugs, and not as someone recruited into a conspiracy because of the seizure.

Respondent suggests that *United States v. Broce*, supra, demonstrates that the Ninth Circuit's determination that the facts shown were insufficient to establish the single conspiracy charged is one deserving of the same deference this Court would give any other criminal appellate decision regarding sufficiency of the evidence.

Other double jeopardy decisions support the decision in this case. In *United States v. Mallah*, 503 F.2d 971, 987 (2nd Cir. 1974), cert. denied, 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975), the court stated "[t]he government cannot argue that the courts must take a broad view of the scope of a conspiracy for the purpose of [*Kotteakos v. United States*] and a narrow view of the offense for the purpose of answering the ultimate question in this double jeopardy claim." 503 F.2d at 984-985.

An indictment for conspiracy to distribute drugs should allege the time frame during which the conspiracy was operative. *United States v. Tavelman*, 650 F.2d 1133, 1137 (9th Cir. 1981).

In *United States v. Martinez*, 562 F.2d 633 (10th Cir. 1977), the defendant was convicted for being in a marijuana dealing conspiracy in Texas in December, 1973. 562 F.2d at 634. He was later convicted of a second marijuana dealing conspiracy spanning the years from November, 1973 to January, 1977 in Oklahoma, Texas, West Virginia, Tennessee, and elsewhere. *Id.* at 635. Martinez challenged the second conviction on double jeopardy grounds, asserting that the Texas conspiracy was "but a slice of the larger conspiracy" in the Oklahoma indictment. *Id.* at 635. In

upholding the trial court's finding of two conspiracies, not one, the court stated:

> In *Bartlett*, the defendant was the master figure in both conspiracies and a defendant Edwards was a lesser figure in both, but the court concluded that separate agreements were involved, and that while one conspiracy might have been entered into for the transactions in both, this was not proven. . . . Where various parties conspire with one common conspirator, the evidence may nevertheless show that separate conspiracies were involved and that no one combination embraced the objectives of the others. . . . The mere fact that the same parties are charged with being members of two conspiracies, and that both conspiracies concerned transactions in the same items and overlapped in time, does not establish that the two conspiracies are the same.

562 F.2d at 638. The factors relied upon in *Martinez*, supra, thoroughly support the courts' conclusions in this case and in *Cruz* that the facts demonstrated that the conspiracies proven as to Cruz and Lopez were separate from the ones charged in the indictment, and not one overall conspiracy. In all fairness and equity, there should be no greater tolerance of a court's finding of separate agreements in a double jeopardy context than there should be in cases like this one and *Cruz*.

In *United States v. Lurz*, 666 F.2d 69 (4th Cir. 1981), the court recognized that the issue of whether there are two conspiracies or one is factual issue, and where the facts differ, so may the conclusion. 666 F.2d at 74. *United States v. Marable*, 578 F.2d 151 (5th Cir. 1978) suggested the focus in this inquiry looks to the time frames, the persons acting as co-conspirators, the statutory offenses,

and "any other description of the offense charged which indicates the nature of scope of the activity which the government sought to punish." 578 F.2d 151. Certainly, in this case, the government should be held to its description of the offense which refuted any suggestion that it was charging Lopez as having been a post-seizure recruit and stated the charge was one of being a member of a conspiracy that led up to the seizure. In fact, the government's statements to that effect can be properly viewed as a binding judicial admission. *United States v. Bentson*, 947 F.2d 1353, 1356 (9th Cir. 1991) (attorney's statement in oral argument, in trial and appellate courts, is a binding judicial admission).

All of the well-established case law cited above in this section amply supports the lower court's finding that the sole conspiracy charged in the indictment, which was certainly viewed by the participants (as discussed in *Broce*, supra) as one not charging "a new conspiracy subsequent to the seizure of the drugs" because Lopez and Jiminez "were clearly members prior to that seizure" (Res. App. 21a), was not born out by the evidence in the case. Just like *Cruz*, the holding is based upon application of sound law to a routine review of the sufficiency of the evidence. The conclusion below should be affirmed. Regardless of *Cruz*, this case was correctly decided because the indictment and the government's stated view thereof limited the charged conspiracy to pre-seizure involvement, and the court of appeals concluded there was insufficient evidence to support the charged conspiracy.

D. Neither *Cruz* Nor This Case Creates Any New Hardship Or Difficulties For Law Enforcement Or Prosecution

Courts have long recognized that prosecution of conspiracy cases is without doubt a "heavy burden on the prosecution." *Krulewitch v. United States*, supra, 336 U.S. at 453 (Jackson, J., concurring). Charging decision, especially ones requiring a determination of whether a single or separate conspiracies are shown, "requires the government to make delicate judgments." *United States v. Ingman*, 541 F.2d 1329 (9th Cir. 1976). Not only are conspiracy prosecutions complex because the facts in the case are usually complex, but the law of conspiracy is equally so. One noted commentator, Professor Paul Marcus, prefaced his book on the subject of conspiracy cases by noting that his research and preparation of the book "lead me into a complex world of substantive criminal law, criminal procedure, and very difficult practical questions." P. Marcus, *The Prosecution and Defense of Criminal Conspiracy Cases*, v. (1988).

The government was put on clear notice in 1946, fifty-six years ago, of the detrimental consequences that may stem from hasty charging decisions in a conspiracy case, if their proof at trial does not comport with the conspiracy charged in the indictment. *Kotteakos v. United States*, supra. The Court recognized that the decision would be inconvenient for the prosecution, but cautioned that our "Government is not one of mere convenience or efficiency." 328 U.S. at 773. Much of the consternation expressed in the dissenting opinions in this case revolves around the distaste associated with the reversal of the conviction on the charged conspiracy despite the fact the evidence showed involvement in a criminal conspiracy of like kind.

However, that position was recognized, and rejected, long ago.

Neither *Cruz* nor this case creates any additional burdens or obstacles to hinder the government's ability to bring wrongdoers to justice. First of all, Billy Cruz stands convicted of the substantive offense which he committed, attempted possession of a controlled substance with intent to deliver. 127 F.3d at 797. No legal barriers were constructed by the Court of Appeals decision in this case that prevent a substantive charge against Lopez. Justice Jackson expressed the sentiment in *Krulewitch v. United States*, that "where the conspiracy consists of the concert of a loathsome panderer and a prostitute to go from New York to Florida to ply their trade . . . it would appear that a simple Mann Act prosecution would vindicate the majesty of federal law." 336 U.S. at 449 (Jackson, J., concurring).

Second, under *Cruz* and this case, the government certainly can bring a conspiracy charged against each conspirator so long as the charge reflects the conspiracy shown by the facts. In this case, it is abundantly clear that the trial and appellate court gave the government every opportunity to demonstrate that it had the necessary proof to support its theory of the Lopez' conspiratorial act, which was that he joined in a criminal conspiracy prior to November 18, wherein he reached "an association and agreement among these . . . individuals [Sotello and Recio] and Mr. Arce and others to bring narcotics from the southern part of the United States up to Idaho." The court also allowed the government to present a second theory of conspiracy which had no time constraints, which was allegedly ongoing after November 18. The Court of Appeals

considered all the evidence and concluded that the government had not proven either charge.

Nothing in the opinion can properly be said to create a windfall for conspirators. The government's intervention will not prevent prosecution for those who in fact joined the conspiracy beforehand. It will not prevent prosecution for those who join a conspiracy afterwards. *Cruz* and this case recognize that separateness of a conspiracy, or agreement, reached after and only because the government foiled the first agreement. They are not the first cases to do so. They did not rule that the same results should apply as a matter of law in other cases. They made decisions based upon the specific facts of the case and the specific charge contained in the indictment. Courts have recognized that in determining whether one or two separate conspiracies is shown, the factual inquiry includes the relative time frame, especially where intervening factors are present which make it clear that one conspiracy ended before another one began. *United States v. Mallah*, 503 F.2d 971, 986 (2d Cir. 1974).

In this case, the government, for lack of a better term, stumbled upon a load of drugs being transported in Nevada. There had been no on-going investigation. Not being satisfied with the arrest of two men, they decided to stage a delivery of the drugs to in an effort to catch the one(s) expecting them. When that attempt failed, they persuaded one of the arrested suspects to make a phone call to lure someone in to pick up the lost truck and its contents. The government at this stage was proceeding with an expanded "sting" and doing so in complete reliance upon the word of an arrested suspect, one who indicated his part in the conspiracy was to assist in transport of the one load, nothing before, nothing after. It seems clearly foreseeable

that the efforts to draw in suspects to get the truck might get persons who had been involved all along, or might get a new participant with no prior knowledge. If the government was to place Lopez on trial for conspiracy, it has the obligation to correctly define the parameters of that alleged conspiracy in the indictment. The government steadfastly maintained that it would prove Lopez was part of the conspiracy that led up to the seizure of the drugs. It specifically rejected the idea that the conspiracy charge was for any agreement he made after Arce made his call to pass on the message that the transport had failed. The government should not cry foul with the Court of Appeals for holding them to that burden.

In *Krulewitch*, supra, Justice Jackson correctly pointed out that it is for the prosecutors, not the courts, to determine when to use a "scatter gun" to bring down the defendant, but "there are procedural advantages from using it which add to the danger of unguarded extension of the concept." 336 U.S. at 452. He warned that "even when appropriately invoked, the looseness and pliability of the doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to extend the doctrine to meet the exigencies of a particular case." *Id.* at 449. Respondent urges this Court to decline Petitioner's request to extend the doctrine of conspiracy to meet the exigencies of this particular case by finding a proper conviction in spite of the fact that the government did not prove what it stated it would prove in terms of Lopez involvement with the conspiracy charged in the indictment.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted.

THOMAS A. SULLIVAN

Attorney for Adrian Meza-Lopez

August 2002

APPENDIX A

BETTY H. RICHARDSON
UNITED STATE ATTORNEY
KIM R. LINDQUIST
ASSISTANT UNITED STATES ATTORNEY
DISTRICT OF IDAHO
WELLS FARGO CENTER, SUITE 201
877 WEST MAIN STREET
BOISE, IDAHO 83702
TELEPHONE: (208) 344-1211
MAILING ADDRESS: P.O. BOX 32
BOISE, IDAHO 83707

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, vs. MANUEL SOTELO, RAMIRO ARCE, FRANCISCO JIMINEZ, ADRIAN LOPEZ, Defendants.	Criminal No. 97-102-S-BLW RESPONSE BY UNITED STATES TO DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL

The United States of America and Betty H. Richardson, United States Attorney for the District of Idaho, through Kim R. Lindquist, Assistant United States Attorney, respond to the above-referenced motion as follows:

Each defendant moves for a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. Rule 29 reads in pertinent part:

(a) . . . Motions for directed verdict as abolished and motions for judgment of acquittal shall be

used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

* * *

(b) **Motion After Discharge of Jury.** If the jury returns a verdict of guilty . . . , a motion for judgment of acquittal may be made or renewed within seven days after the jury is discharge. . . . If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. . . .

In evaluating a Rule 29 motion, the court must review the evidence in the light most favorable to the government and decide whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Riggins*, 40 F.3rd 1055, 1057 (9th Cir. 1994).

Defendants Lopez and Jiminez rely on the case of *United States v. Cruz*, 127 F.3rd 791 (9th Cir. 1994).

Defendants Lopez and Jiminez rely on the case of *United States v. Cruz*, 127 F.3rd 791 (9th Cir. 1997), in arguing that the respective involvement of the two defendants was subsequent to the arrest of co-defendants Sotelo and Arce and the seizure of the cocaine and marijuana in Nevada, and that such seizure constituted the defeat of the object of the conspiracy, thereby precluding sufficient

evidence for a rational jury to have found beyond a reasonable doubt that the conspiracy was still in existence at the time of their involvement.[1]

The *Cruz* case is distinguishable from the case at bar. In *Cruz*, the appellate court found that, as to the appellant, the conspiracy ended by virtue of the defeat of its object in the form of the confiscation of the drugs *before* the appellant became involved in the drug-related activities. Indeed, the evidence showed and the Government conceded that the appellant was initially recruited by a co-defendant *after* the arrest of the co-defendant and the seizure of the drugs in the latter's possession. In holding that the conspiracy terminated before appellant became involved, the appellate court also rejected the Government's argument that appellant's payment constituted the anticipated "last act" of the ongoing conspiracy. In distinguishing the case of *United States v. Mason*, 658 F.2d 1263, 1269-70 (9th Cir. 1981), cited by the Government, the appellate court pointed out that *Mason* "involved[d] statements by a conspirator . . . made after the arrest of other members of the conspiracy, not the liability of a person **recruited after** the arrest had occurred . . . ." The evidentiary context in *Mason* was statements made by one conspirator after another conspirator had been arrested, but with the prior involvement of the former clearly substantiated by the evidence. To this end, the appellate court declared that "it is more reasonable to characterize

---

[1] Although citing the *Cruz* case in his motion document, at the time of the United States' response no supporting memorandum had been filed by Defendant Jiminez.

[appellant's] behavior as part of a new conspiracy ., . ., rather than part of the original conspiracy." *Cruz* at 795.

The case at bar is different. As to Defendants Jiminez and Lopez, the arrest of Sotelo and Arce and the seizure of the narcotics in Nevada did not terminate the conspiracy or defeat the object of that conspiracy as fare as they were concerned, by virtue of their prior involvement. Indeed, their activities after the arrest and confiscation were merely a manifestation of that prior involvement. In this regard, the telephone call by Arce was not that of "recruitment," but one of notice of the load arrival in a pre-existing and ongoing conspiracy as far as they knew and were concerned. All of the evidence admitted as to Defendants Jiminez and Lopez, from the pre-Sotelo/Arce arrest telephone calls to the events immediately associated with their picking up the "sting" loan of narcotics manifested prior involvement. Indeed, there was no evidence presented by the defense or the United States that suggested exclusive post-drug seizure recruitment. When Arce made the delivery notice telephone call, he did so as a co-conspirator to other co-conspirators, with yet other co-conspirators responding to pick up the load, namely, Defendants Jiminez and Arce.

Moreover, the "last act" theory espoused by the *Mason* case and rejected by the *Cruz* court is applicable here. Although *Mason* involved statements by a conspirator made after the arrest of other members of the conspiracy, the activities and statements by Jiminez and Lopez in this case are analogous to the post-seizure statements of *Mason*. Indeed, as substantiated by the evidence, at the time Jiminez and Lopez acted, including making statements upon their arrest, they were clearly already involved

in the conspiracy. There was no evidence to the contrary beyond potential arguments of counsel.

With this, the evidence was more than sufficient for any rational jury to have found beyond a reasonable doubt that the conspiracy was still in existence at the time Jiminez and Lopez were shown to be involved.

Defendant Lopez, also citing *Cruz*, argues further that he should be acquitted of the possession with intent to distribute count by virtue of the *Pinkerton* charge and that he is not liable for any underlying substantive offense committed by Sotelo and Arce because he was not a member of that conspiracy.

Once again, the evidence elicited at trial, especially taken in the light more favorable to the United States, shows that he was a member of that conspiracy and properly subject of the *Pinkerton* charge. Moreover, that same evidence showed Defendant Jiminez to personally be in possession of the narcotics with the intent to distribute the same, independent of the any *Pinkerton* ties to a conspiracy.

Defendant Sotelo seems to argue simply that no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Sotelo first and misleadingly cites the case of *United States v. Baron*, 94 F.3rd 1312 (9th Cir. 1996), for the proposition that, by virtue of the Defendant's arguable ignorance of the hidden drugs, "the jury may have convicted Baron without finding the necessary *mens rea* . . . [.]"

Beyond the factual similarity associated with the vehicle stop, the two cases are divergent. From a legal

standpoint, the *Baron* conviction was reversed because a *Jewell* instruction was given the jury absent a sufficient factual showing of proof of deliberate avoidance, thereby leaving the jury to impermissibly infer guilty knowledge on the basis of mere negligence without such proof of deliberate avoidance. In so holding, the *Baron* court emphasized that the *Jewell* instruction "should not be given when the evidence is that the defendant had **either actual knowledge or no knowledge at all** of the facts in question." Citing *United States v. Sanchez-Robles*, 927 F.2d 1070 (9th Cir. 1991). Not only did the *Baron* facts fail to show the requisite proof of deliberate avoidance, they actually suggested actual knowledge of the drug contents of the car, thereby further precluding the giving of the *Jewell* instruction. It was within this context, in specifically determining whether the court should exercise its discretionary authority to reverse the conviction, that the appellate tribunal declared that the jury might "have convicted Baron with finding the necessary *mens rea* required under 21 U.S.C. § 841(a)(1)." That is, without the requisite evidence of deliberate avoidance in order to substantiate the *Jewell* instruction, the jury might impermissibly have inferred guilty knowledge on the basis of mere negligence without such proof.

In the case at bar, no *Jewell* instruction was given because **factually** there was no proof of deliberate avoidance **and** there was substantial evidence of actual knowledge. Indeed, the evidence of actual knowledge was overwhelming, from the facts associated with the transportation and stop of the narcotics-laden truck, to the story given the police by Sotelo, to the telephone activity by Sotelo, to the detailed testimony of co-defendant Arce as to Sotelo's involvement. Thus, the *Baron* case is not only

inapplicable as asserted by Sotelo but, indeed, substantiates the verdict in the case at bar.

The foregoing takes us to Sotelo's second emphasis, namely, the isolation of various facts elicited at trial and their characterization as innocent as standing alone. In essence, Sotelo makes a closing argument under the guise of Rule 29(c). However, when all of the evidence is taken as a whole, the proof against Mr. Sotelo was overwhelming. Accordingly, the Rule 29 Motion by Sotelo at the end of the Government's case-in-chief was denied by the trial court, and the jury agreed, as proclaimed by its verdict.

Finally, Sotelo declares that he was convicted as a result of bias and prejudice unrelated to his proved activities. Indeed, in his memorandum his attorney states:

> Bias and prejudice have been the scourge of the legal system and should be fought against in every case in which it [sic] may exist, regardless of the gravity of the offense. To fight bias requires both an immense intellectual effort and a courageous stand. In this case, the only evidence tying Sotelo to the crimes alleged was that he was driving a truck carrying hidden drugs. . . .

To the foregoing, it can only be said that Mr. Sotelo was convicted by a reasonable and rational jury with evidence overwhelming as to his guilt. Moreover, it must be stated that some individuals are so preoccupied and concerned with possible bias and prejudice, in whatever form, that they fail or refuse to properly perceive reality; that is, they suffer from their own distinct form of bias and prejudice. In their case, too, an immense intellectual effort and a courageous stand are required to fight the same.

Accordingly, the respective motions should be denied.

Dated this 7th day of April, 1998.

BETTY H. RICHARDSON
United States Attorney

/s/ Kim R. Lindquist
Kim R. Lindquist
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee in the office of the United States Attorney; that a true and correct copy of the foregoing Response by United States to Defendants' Motions for Judgment of Acquittal was faxed, hand delivered or mailed by United States mail, postage prepaid, this 7th day of April, 1998, to the persons whose names are listed below.

Ismael Chavez
Attorney at Law
717 So. Kimball Avenue
Post Office Box 1094
Caldwell, Idaho 83606-1094
Attorney for Manuel Sotelo

Michael J. Kane
Anderson, Kane & Tobiason
Attorneys at Law
350 No. 9th Street, Suite 201
Post Office Box 2865
Boise, Idaho 83701-2865
Attorneys for Ramiro Arce

Terry S. Ratliff
Attorney at Law
1315 West River Street
Boise, Idaho 83702
Attorney for Fran co Jiminez

Thomas A. Sullivan
Wiebe & Fouser, P.A.
Attorneys at Law
702 Chicago Street
Post Office Box 606
Caldwell, Idaho 83606-0606
Attorneys for Adrian Lopez

/s/ A. Robinson